Supreme Court, U.S.
FILED
MAY 26 1993
OFFICE OF THE CLERK

No. 92-1390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT LEE AND ANGELA LEE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY MEMORANDUM

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REPLY MEMORANDUM

The Government, conceding as it must the existence of a square conflict between the decision below and the Ninth Circuit's decision in *Avila* v. *Immigration and Naturalization Service*, 731 F.2d 616 (9th Cir. 1984), nevertheless takes the position that review of the substantial questions presented is not "necessary." Opp. at 8. The only apparent basis for the Government's position is that it prevailed below and there is time enough for the Court to review these questions when the Government—inevitably—next fails to prevail in a court of appeals on these questions.

The administration and adjudication of thousands of claims under the FTCA, however, demands certainty and clarity if that Act is to be applied uniformly. The positions taken by the Government in its opposition establish that the conflict here runs broader and more deeply than simply the conflict between the result reached in the case at bar and *Avila*. Indeed, the Government's argument on the merits illustrates that this case present an important question as to what source of law the federal courts are to look to determine whether an amendment to a properly filed FTCA claim may be said to relate back. The text of the FTCA does not provide an express answer to that question. Furthermore, the courts below expressly adopted the rationale of *Manko* v. *United States*, 830 F.2d 831, 841 (8th Cir. 1988), that amendments that "change the government's settlement calculus" are impermissible after two years. That rationale has, however, been rejected in similar circumstances by four courts of appeals.

1. The Government argues, Opp. at 7, that the Ninth Circuit might reconsider its decision in *Avila* in light of the Court's decision last week in *McNeil* v. *United States*, No. 92-6033 (May 17, 1993). To the contrary, *McNeil* only reinforces the need for review of the case at bar. In *McNeil*, the text of the FTCA expressly addressed and, according to a unanimous Court, resolved in favor of the Government the narrow question presented in that case. In the present case, the text of the FTCA does not address *at all* the question of what rules are to govern the relation

back of amendments to properly filed claims while those claims remain pending before the appropriate federal agency. The Government asserts that "the Federal Rules of Civil Procedure do not presumptively apply to administrative proceedings," Opp. at 5, but that assertion is precisely petitioners' point. Because the FTCA does not speak to this issue expressly, the federal courts must supply a rule of procedure to be followed in literally thousands of cases.[1] The courts will do so either by manufacturing a pro-Government rule out of whole cloth, as did the courts below in this case, or by looking to the analogous Federal Rule of Civil Procedure, which provides a judicially evolved rule grounded in principles of fundamental fairness. That is where the conflict lies.

The Government presses its argument against application by analogy of Rule 15(c) by insisting that rejection of that analogy is appropriate "particularly where, as here, the application of such a rule would effectively undermine an explicit statutory directive." Opp. at 5. What "explicit statutory directive" would be "undermined" is, however, not identified by the Government. If, as the Government effectively argued below, that "directive" has to do with ensuring that the Government has before it a firm dollar figure from which settlement can be discussed, then the Government's position conflicts not only with *Avila* but with the express rationale of decisions of the Third, Fifth and Sixth Circuits cited in the Petition at 11 n.3.[2]

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[1] The Government argues, Opp. at 6, that review of these questions is not warranted at this time "because the issue has arisen only infrequently in FTCA litigation." As discussed below, the legal principles at issue have arisen quite frequently in cases such as *Avery* v. *United States*, 680 F.2d 608 (9th Cir. 1982), and the Government has frequently failed to convince the courts of appeals of the merits of the principles it now urges on this Court. More importantly, the issue is capable of arising in every FTCA claim that is filed; all FTCA claimants and their counsel are entitled to a clear answer to these questions, as are the lower federal courts and the Government itself.

[2] The Government, Opp. at 7 n.4 & 8 n.5, purports to distinguish these cases by limiting these cases to their precise holdings. These cases, however, stand undeniably for the principle that the FTCA's

2. Petitioners do not dispute that the notice requirements of § 2675(a) must be met if their amendment is to be allowed. At the administrative level and prior to the expiration of the statute of limitations, petitioners had provided the Government with a "brief description of the time, place, cause and general nature of the injury . . . ." *Avery* v. *United States*, 680 F.2d 608, 611 (9th Cir. 1982) (Kennedy, J.) (*quoting* 17 McQuillan, *Municipal Corporations* § 4807, at 89-90 (3d ed. 1968)). Here, as in *Avery*, the Government is not entitled "to insist on proof of a claim to its satisfaction before the claimant becomes entitled to a day in court." *Id.*[3] The information provided to the Government in the original claim, without more, would have been sufficient to preclude a finding of prejudice to the Government if Rule 15(c) expressly governed the rights and obligations of petitioners and the Government. That is, of course, the heart of the matter here. Petitioners stand stripped of their claims not because the Government can show prejudice, but because the courts below applied to petitioners a rule materially more draconian than is

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purpose of encouraging settlements may not be bootstrapped, as happened below in this case, into a rule that shields the Government from liability for torts notwithstanding that the Government was put on notice by the administrative claim of the misconduct of its agents giving rise to the claims asserted. Any suggestion by the Government that it could show actual prejudice by petitioners' delay in filing the amendment to the claim at issue would be utterly frivolous, and the Solicitor General appropriately refrains from making such an assertion.

[3] The Government's citation, Opp. at 6, to 6A C. Wright & A. Miller, *Federal Practice and Procedure* § 1497 (1990), is arguably misleading. As Professors Wright and Miller observe, if a plaintiff, by amendment, seeks to "allege an entirely different transaction," the amendment will not be allowed under Rule 15(c). *Id.*, § 1497, at 70, 73. At issue here, however, is whether "the alteration of the original statement [of the claim] is so substantial that it cannot be said that defendant was given adequate notice of the conduct, transaction, or occurrence that forms the basis of the claim . . . ." *Id.*, at 79. The Solicitor General fails to come to grips with this principle, which governs all civil litigants in the federal court system, because it is plain that on this principle, petitioners were and are entitled to amend the original claim based upon their bringing to the federal agency involved sufficient information regarding the misconduct of the federal employees involved.

applied every day of the week to every litigant who brings or defends against a cause of action in a federal court. The Government can point to no language in the FTCA mandating such a result because there is none.

3. Review should be granted to resolve these important questions that impact the administrative processing and adjudication of thousands of cases in every circuit. The Court should decide whether, in FTCA cases, Rule 15 (c) is to be applied by analogy to govern the relation back of amendments to FTCA claims pending at the administrative stage and, if not, what rules are to govern such amendments.

May 26, 1993

Respectfully submitted,

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